Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–8 OF 2007

RAUS SHARIF, SULONG MATJERAIE AND KANG HWEE GEE JJCA

23 FEBRUARY 2010

Contract — Sale and purchase of land — Breach — Failure to pay balance purchase price — Letter of undertaking by purchaser's solicitor for release of documents before full payment of purchase price — Whether solicitor could be held responsible for undertaking — Whether undertaking made in personal capacity — Whether second respondent accepted qualified undertaking — Whether letters written after registration of transfer of land could be used as aid in construction of contract

Legal Profession — Solicitor's undertaking — Construction of undertaking — Undertaking for release of documents before full payment of purchase price — Whether solicitor could be held responsible for undertaking — Whether undertaking made in personal capacity

Semenda Sdn Bhd, the first appellant vendor ('the first appellant'), had through its attorney, Dandrawi Sdn Bhd, entered into a sale and purchase agreement ('the SPA') with CD Anugerah Sdn Bhd ('the first respondent') for the sale of a piece of land situated in Seremban for a consideration of RM600,000. At all material times the second appellant law firm were the solicitors for the first appellant vendor in the land transaction, while the second respondent law firm were the solicitors for the first respondent purchaser. Upon execution of the SPA the first respondent paid RM60,000, which was ten per cent of the total purchase price, as deposit and part payment to the first appellant with the balance of the purchase price of RM540,000 to be paid in accordance with the terms and conditions of the SPA. It was a term of the SPA that the balance of the purchase price was to be paid to the vendor on or before the expiry of three months from the date of execution of the SPA or one month from the date of receipt of the letter of consent to transfer from the land office, whichever was the later ('the completion date'). There was also a specific provision in the SPA that the first appellant deposit the original document of title, current quit rent receipts and assessment receipts with the second appellant as the vendor's solicitors so that the latter could forward the documents to the second respondent for registration after the first respondent purchaser paid the balance of the purchase price. Although the rights and obligations of the parties were clearly

spelled out in the SPA, the second respondent wrote a letter dated 5 February 1998 to the second appellant requesting the latter to forward to them the original document of title and original letter of consent for transfer for the purpose of presentation to the land office. Although this request was in variance with the terms of the SPA, the second respondent undertook on behalf of their client that they would release the balance of the purchase price within three weeks from the date of presentation of the transfer. The second appellant by way of its letter dated 6 February 1998 forwarded the requested documents to the second respondent on condition that the documents were to be forwarded for the distinct purpose of presentation to the land office; that the second respondent undertake to release the balance of the purchase price within three weeks from the date of presentation of the documents; and that the first respondent clients of the second respondent undertake to pay the interest for late payment. The second respondent received and accepted the documents forwarded without any qualification and caused the land to be registered in favour of the first respondent on 24 February 1998. The balance purchase price ought to have been paid to the appellants three weeks after 24 February 1998 ie on or before 17 March 1998, but no payment was received by then. When the second appellant wrote to the respondent asking for the release balance purchase price, the second respondent resiled from their undertaking and replied that they had yet to receive the balance purchase price from the first respondent. The second respondent also alleged that the undertaking given in their letter on 5 February 1998 was given on behalf of their client and not the firm. When the matter could not be resolved amicably it was brought to trial. The trial judge found that the undertaking letter dated 5 February 1998 prevailed over the SPA and that the undertaking given by the second respondent was on behalf of the first respondent and not on the firm's personal capacity. As such, the trial judge found that the second respondent could only be responsible with regard to the undertaking if the balance purchase price was received but not given to the first appellant. The trial judge also found that the second appellant knew or ought to have known that as at 5 February 1998 the balance purchase price had not been received by the second respondent. Based on these findings the second appellant's claim was dismissed with costs. This was the appellants' appeal against that decision. The appellants submitted that when the trial judge considered the consequences of the letter dated 5 February 1998 he had failed to appreciate the letter of 6 February 1998 which superseded the undertaking letter of 5 February 1998.

Held, allowing the appeal with costs:

(1) The facts of the case are totally different from the trial judge's finding that when the letter of 5 February was given, the second appellant knew or ought to have known that the balance of the purchase price had been received by the second respondent. In fact the second appellant only

knew that the balance purchase price was not with the second respondent on 18 March 1998. As such the decision of the trial judge was based on a wrong premise and amounted to a misdirection. Further by virtue of the clauses in the SPA it was only reasonable for the second appellant to expect that when the undertaking letter of 5 February was issued the balance of the purchase price was with the second respondent (see para 31).

(2) Although the trial judge considered the implications of the letter of 5 February, there was an absolute lack of deliberation and appreciation on the efficacy of the letter dated 6 February 1998, which was equally important in that it qualified the earlier letter. This clearly showed that the premise upon which the trial judge based his conclusion and finding cannot be sustained (see para 35).

(3) The letter dated 6 February 1998 contained two undertakings, namely, the undertaking of the second respondent to release to the second appellant the balance of the purchase price within three weeks from the date of presentation of the transfer and the undertaking of the client of the second respondent to pay the interest for the late payment. In addition the terms were couched in lucid, clear, unqualified and unequivocal language and the writer of the letter dated 5 February 1998 agreed with the terms of the letter dated 6 February 1998. Further the second respondent by receiving and accepting the documents forwarded without qualification and sending the same for registration in favour of their client had unequivocally accepted the terms imposed onto them by the second appellant in the letter dated 6 February 1998. If the terms of the letter dated 6 February 1998 were unacceptable to the second respondent then it would have returned the documents forwarded to it to the second appellant (see paras 40–43).

(4) It is settled law that what the parties said or did after the contract was made could not be used as an aid in the construction of the contract. As such, the letters made after 6 February 1998 could not be taken into account to ascertain the intention of the parties (see paras 45–46).

(5) The issuance of a letter of undertaking from one firm to another marks the epitome of conveyancing practice in any Torrens jurisdiction. In the instant case the letter of undertaking was used for the release of documents before the full payment of the purchase price had been made. The fact that the undertaking was made on behalf of their client should not and would not absolve solicitors from the need to be responsible for their action in ensuring that all was in order before such letters of undertaking are issued or accepted or even acted upon. In the event that the second respondent was unable to perform the obligations required it should have returned the documents forwarded to it. However, as it failed to return the documents but proceeded with the

registration and transfer it must be held to have accepted the terms of the letter dated 6 February 1998 and be held responsible for the undertaking (paras 47, 49 & 54).

[Bahasa Malaysia summary

Semenda Sdn Bhd, penjual perayu pertama ('perayu pertama'), melalui wakilnya, Dandrawi Sdn Bhd, menandatangani satu perjanjian jual beli ('PJB') dengan CD Anugerah Sdn Bhd ('responden pertama') bagi sebidang tanah yang terletak di Seremban untuk RM600,000. Pada setiap masa yang material firma guaman perayu kedua merupakan peguamcara kepada penjual perayu pertama dalam urusan tanah tersebut, sementara firma guaman responden kedua merupakan peguamcara bagi pembeli responden pertama. Setelah pelaksanaan PJB tersebut, responden pertama membayar RM60,000 yang mana merupakan sepuluh peratus daripada jumlah harga belian, sebagai deposit dan sebahagian bayaran kepada perayu pertama dengan baki harga belian ialah RM540,000 yang perlu dibayar berikutan terma-terma dan syarat-syarat PJB tersebut. Salah satu terma PJB tersebut ialah baki harga belian harus dibayar kepada penjual pada atau sebelum tamat tempoh tiga bulan dari tarikh pelaksanaan PJB tersebut atau satu bulan dari tarikh penerimaan surat kebenaran pindah milik daripada pejabat tanah, yang mana satu terkemudian ('tarikh penyempurnaan'). Juga terdapat peruntukan khusus dalam PJB tersebut bahawa perayu pertama menyerahkan dokumen hak milik asal, resit-resit cukai tanah terkini dan resit-resit taksiran kepada perayu kedua sebagai peguamcara penjual agar peguamcara tersebut dapat menyerahkan dokumen-dokumen tersebut kepada responden kedua untuk pendaftaran selepas pembeli responden pertama membayar baki harga belian itu. Walaupun hak-hak dan tanggungjawab pihak-pihak jelas dinyatakan dalam PJB, responden kedua melalui surat bertarikh 5 Februari 1998 kepada perayu kedua memintanya menyerahkan dokumen hak milik asal dan surat kebenaran pindah milik asal untuk diserahkan ke pejabat tanah. Walaupun permintaan ini berbeza dengan terma-terma PJB, responden kedua mengakujanji bagi pihak anak guam mereka bahawa mereka akan memberikan baki harga belian dalam masa tiga minggu dari tarikh penyerahan pindah milik itu. Perayu kedua, menerusi surat bertarikh 6 Februari 1998 menyerahkan dokumen-dokumen yang dipinta kepada responden kedua dengan syarat bahawa dokumen-dokumen tersebut diserahkan bagi tujuan penyerahan kepada pejabat tanah; bahawa responden kedua mengakujanji untuk menyerahkan baki harga belian dalam masa tiga minggu dari tarikh penyerahan dokumen-dokumen tersebut; dan bahawa responden pertama, anak guam responden kedua mengakujanji membayar faedah bagi bayaran lewat. Responden kedua menerima dokumen-dokumen tersebut tanpa sebarang syarat dan tanah tersebut didaftarkan atas nama responden pertama pada 24 Februari 1998. Baki harga belian tersebut harus dibayar kepada perayu-perayu tiga minggu selepas 24 Februari 1998, iaitu pada atau sebelum 17 Mac 1998, tetapi tiada bayaran diterima. Apabila

perayu kedua meminta kepada responden untuk membayar baki harga belian tersebut, responden kedua berpaling daripada akujanji mereka dan membalas bahawa mereka masih belum menerima baki harga belian daripada responden pertama. Responden kedua juga mendakwa bahawa akujanji yang diberikan dalam surat mereka bertarikh 5 Februari 1998 diberikan bagi pihak anak guam mereka dan bukan firma guaman tersebut. Apabila perkara tersebut tidak dapat diselesaikan secara baik, perkara itu dibawa untuk dibicarakan. Hakim perbicaraan memutuskan bahawa surat akujanji bertarikh 5 Februari 1998 mengatasi PJB tersebut dan akujanji yang diberikan oleh responden kedua adalah bagi pihak responden pertama dan bukannya bagi pihak firma guaman. Maka, hakim perbicaraan memutuskan bahawa responden kedua hanya bertanggungjawab atas akujanji jika baki harga belian diterima tetapi tidak diberikan kepada perayu pertama. Hakim perbicaraan juga mendapati bahawa perayu kedua sedia maklum atau harus tahu bahawa setakat 5 Februari 1998 baki harga belian tidak diterima oleh responden kedua. Berdasarkan penemuan-penemuan tersebut tuntutan perayu kedua ditolak dengan kos. Ini merupakan rayuan perayu-perayu terhadap keputusan tersebut. Perayu-perayu berhujah bahawa apabila hakim perbicaraan mempertimbangkan kesan-kesan surat bertarikh 5 Februari 1998 dia gagal menilai surat bertarikh 6 Februari 1998 yang mana mengatasi surat akujanji 5 Februari 1998.

Diputuskan, membenarkan rayuan dengan kos:

(1) Fakta-fakta kes tersebut adalah berbeza dengan keputusan hakim perbicaraan di mana apabila surat bertarikh 5 Februari diberi, perayu kedua sedia maklum atau harus tahu bahawa baki harga belian telah diterima oleh responden kedua. Malah, perayu kedua mengetahui bahawa baki harga belian tidak diterima oleh responden kedua hanya pada 18 Mac 1998. Oleh itu, keputusan hakim perbicaraan adalah berdasarkan premis yang salah dan merupakan satu salah arah. Selanjutnya, berikutan klausa-klausa dalam PJB tersebut, adalah wajar bagi perayu kedua untuk menjangkakan bahawa apabila surat akujanji bertarikh 5 Februari dikeluarkan, baki harga belian tersebut sudah pun dalam tangan responden kedua (lihat perenggan 31).

(2) Walaupun hakim perbicaraan mempertimbangkan kesan-kesan surat bertarikh 5 Februari itu, tiada langsung pertimbangan dan penilaian ke atas keberkesanan surat bertarikh 6 Februari 1998, yang mana sama pentingnya dan surat tersebut mengatasi surat sebelumnya. Ini jelas menunjukkan bahawa premis yang dirujuk oleh hakim perbicaraan untuk kesimpulan dan keputusannya tidak boleh diterima (lihat perenggan 35).

(3) Surat bertarikh 6 Februari 1998 mengandungi dua akujanji iaitu, akujanji responden kedua untuk menyerahkan kepada perayu kedua baki harga belian dalam masa tiga minggu dari tarikh penyerahan pindah milik tersebut dan akujanji anak guaman responden kedua untuk membayar faedah bayaran lewat. Tambahan lagi, terma-terma tersebut dinyatakan dengan jelas, nyata, tidak terbatas dan penulis surat bertarikh 5 Februari 1998 telahpun bersetuju dengan terma-terma surat bertarikh 6 Februari 1998. Selanjutnya, responden kedua, dengan menerima dokumen-dokumen yang diserahkan tanpa sebarang syarat dan menghantarnya pula untuk pendaftaran bagi pihak anak guam mereka dengan jelas telah menerima terma-terma yang dikenakan terhadap mereka oleh perayu kedua dalam surat bertarikh 6 Februari 1998. Jika terma-terma surat bertarikh 6 Februari 1998 tidak dapat diterima oleh responden kedua, maka ia harus memulangkan dokumen-dokumen yang diserahkan kepada perayu kedua (lihat perenggan 40–43).

(4) Adalah menjadi undang-undang tetap apa yang dikatakan atau dilakukan oleh pihak-pihak selepas kontrak dibuat tidak boleh digunakan untuk mentafsirkan kontrak. Oleh itu, surat yang dibuat selepas 6 Februari 1998 tidak boleh diambilkira untuk menentukan niat pihak-pihak (lihat perenggan 45–46).

(5) Surat akujanji yang dikeluarkan oleh satu firma guaman kepada firma yang lain merupakan contoh unggul amalan pemindahakan dalam mana-mana bidang kuasa Torrens. Dalam kes ini, surat akujanji digunakan untuk penyerahan dokumen-dokumen sebelum bayaran penuh harga belian telah dibuat. Fakta bahawa akujanji tersebut dibuat bagi pihak anak guam mereka tidak harus dan tidak akan membebaskan peguamcara daripada keperluan untuk bertanggungjawab ke atas tindakan mereka dalam memastikan bahawa kesemuanya teratur sebelum surat akujanji tersebut dikeluarkan ataupun diterima atau diambil tindakan. Dalam keadaan apabila responden kedua tidak boleh melaksanakan kewajipan-kewajipan yang diperlukan, ia harus memulangkan dokumen-dokumen yang diserahkan kepadanya. Walau bagaimanapun, memandangkan ia gagal memulangkan dokumen-dokumen tersebut tetapi meneruskan dengan pendaftaran dan pindah milik, ia seharusnya telah menerima terma-terma surat bertarikh 6 Februari 1998 dan bertanggungjawab ke atas akujanji tersebut (lihat perenggan 47, 49 & 54).]

Notes

For cases on breach, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4910–4922.

For cases on construction of undertaking, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2112–2113.

Cases referred to

Caldwell v Sumpters (a firm) & Anor [1972] 1 All ER 567, CA (refd)
Hawkins v Gaden (1925) 37 CLR 183 (refd)
James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, HL (refd)
Nasir Kenzin & Tan v Elegant Group Sdn Bhd [2009] 1 AMR 715, CA (refd)
Syarikat Jengka Sdn Bhd v Tri-Trade Properties (M) Sdn Bhd & Anor [1988] 3 MLJ 163; [1988] 2 CLJ (Rep) 451, HC (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267, PC (refd)

Legislation referred to

Evidence Act 1950 s 73A(3)

Manian Raju (Krishna Dallumah, Manian & Indran) for the appellants.
CK Yeoh (Ranjit Singh & Yeoh) for the respondents.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of the court.

PREAMBLE

[2] At all material times in the land transaction relevant to this case, the first appellant was represented by the second appellant, Messrs Saprudin & Co whereas CD Anugerah Sdn Bhd was represented by Messrs Abu Talib Shahrom & Zahari. It should also be noted here that a default judgment had been obtained by the appellants against the CD Anugerah Sdn Bhd.

BRIEF FACTS

[3] By virtue of a power of attorney granted by the first appellant to Dandarawi Sdn Bhd (81234K), a company incorporated in Malaysia and having its place of business at No 63, 1st Floor, Jalan Tuanku Antah, 70100 Seremban, Negeri Sembilan Darul Khusus ('attorney'), the attorney entered into a sale & purchase agreement dated 28 May 1997 ('the agreement') with CD Anugerah Sdn Bhd (274292V) a company incorporated in Malaysia and having its place of business at 21B, Jalan SS 6/12, Kelana Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan for the sale of a piece of land under HS(D) 72032, PT No 13278 in the Mukim of Ampangan, District of Seremban, Negeri Sembilan Darul Khusus ('the said land') for a consideration of RM600,000.

[4] A sum equivalent to ten percent (10%) of the purchase price amounting to RM60,000 as a deposit and part payment was paid upon execution of the agreement. The balance of the purchase price payable in the sum of RM540,000 shall be payable in accordance with the terms and conditions of the agreement. Clause 3 of the agreement reads as follows:

3. *PAYMENT OF PURCHASE PRICE*

3.1 The Purchase Price shall be paid by the Purchaser in the following manner:

(a) as to the Ringgit Malaysia Sixty Thousand (RM60,000.00) only (hereinafter referred to as 'the Deposit') to be paid to the Vendor's Solicitors as stakeholders upon execution of this Agreement as a deposit and part payment of the Purchase Price.

(b) as to the balance of the Purchase Price of Ringgit Malaysia Five Hundred Forty Thousand (RM540,000.00) only (hereinafter referred to as 'the Balance Purchase Price') *shall be paid to the Vendor* through the Vendor's Solicitors as stakeholders *on or before the date of expiry of three (3) months from the date of the execution of this Agreement or One (1) month from the receipt of the Letter of Consent to Transfer from the Land Office whichever is the latter* (hereinafter referred to as 'the Completion Date') PROVIDED THAT the Purchaser's Solicitors has completed the registration of transfer in the title document. In the event the Purchaser's Solicitors fails to register the transfer for whatever reason as specified in Clause 15.1, the full sum of the Purchase Price shall be refunded. The Vendor's Solicitors shall release the Balance Purchase Price to the Vendor within fourteen (14) days after the presentation of the transfer and all relevant documents for registration at the appropriate land office in favour of the Purchaser.

3.2 The Vendor hereby irrevocably confirms and acknowledges that all payments made to the Vendor's Solicitors by the Purchaser shall be deemed to be payments made to and received by the Vendor towards the account of the Purchase Price and an acknowledgment from the Vendor's Solicitors acknowledging the receipt of such moneys shall be valid, good and effective discharge of the Purchaser for the same PROVIDED THAT all of which moneys shall be paid by the Completion Date or the Extended Completion Date.

(Emphasis added.)

[5] There is also a specific provision in the agreement to deposit the original document of title, current quit rent receipts, assessment receipts and this is at cl 5.3 which reads as follows:

5. DEPOSIT OF DOCUMENTS AND ADJUDICATION OF TRANSFER

5.1 ...

5.2 ...

5.3 Upon the execution of this Agreement, the Vendor shall deposit the original

document of title, current quit rent receipts, assessment receipts (hereinafter referred to as 'the Documents') with the Vendor's Solicitors for custody. *The Vendor's Solicitors is irrevocably authorised to forward the Documents to the Purchaser's Solicitors for registration after the Purchaser paving the Balance Purchase Price*.(Emphasis added.)

[6] Pursuant to cl 5.3 of the agreement, it is clear that the second appellant shall only forward the original document of title, current quit rent receipts and assessment receipts after the balance purchase price of RM540,000 had been received by the second appellant as the vendor's solicitors.

[7] Notwithstanding the clear demarcation of rights and obligation of the parties involved as stipulated under cl 5.3 of the agreement, the respondent wrote a letter dated 5 February 1998 to the second appellant requesting for the original issue title together with the original letter of consent of transfer for presentation purposes on their undertaking to release to the second appellant the balance purchase price within three weeks from the date of presentation.

LETTER DATED 5 FEBRUARY 1998

[8] This case revolves around the letter dated 5 February 1998 (undertaking letter of 5 February) and it is a crucial piece of evidence and it is therefore felt proper to reproduce it in full hereunder.

ABU TALIB SHAHROM & ZAHARI

PEGUAMBELA & PEGUAMCARA

Our Ref: ATSZ/COR/5365/97/HH

Your Ref: SMS/SEA/RB/8/42/97

5 February 1998

URGENT/BY FAX AND POST

FAX NO: 06-7620873

Attn: Encik Saprudin

Messrs Saprudin & Co.

No. 62 First Floor

Jalan Tunku Antah

70100 Seremban

Negeri Sembilan Darul Khusus

Dear Sirs

SALE AND PURCHASE OF PROPERTY HELD UNDER H.S.(D) 72032 P.T. NO. 13278 MUKIM OFAMPANGAN VENDOR: DANDARAWISDN BHD

We refer to the teleconversation between Encik Saprudin and our Puan Hairolnisah of even date.

Kindly forward to us the original issue of title No. H.S. (D) 72032 P.T. NO. 13278 MUKIM OF AMPANGAN together with the original Letter of Consent to Transfer for presentation purposes at the relevant Land Office. With regards to the foregoing, we undertake on behalf of our Client to release to you the balance purchase price of the above property within three (3) weeks from the date of presentation on the Transfer.

We further confirm that we have obtained the consent to charge of the property.

Yours faithfully,

ABU TALIB SHAHROM & ZAHARI

Sgd.

c.c. CD Anugerah Sdn Bhd (Fax No.: 7034279

Attn: Encik Mustafa Kamal Madin

[9] Paragraph 2 of the undertaking letter of 5 February is critical as it says:

Kindly forward to us the original issue of title No. H.S.(D) 72032 P.T. No. 13278 MUKIM OF AMPANGAN together with the original Letter of Consent to Transfer for presentation purposes at the relevant Land Office. With regards to the foregoing, *we undertake* on behalf of our Client to release to you the balance purchase price of the above property within three (3) weeks from the date of presentation of the Transfer.

[10] This appears to be in variance with cl 5.3 of the agreement. However since the respondent undertakes on behalf of their client to release to the second appellant the balance purchase price of the said land within three weeks from the date of presentation of the transfer, the second appellant obliged.

[11] The very next day, the second appellant replied vide their letter of reference SMS/CT/rs/8/45/97 dated 6 February 1998 (February 6 letter) forwarding the original issue document of title and the original consent letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus. It was addressed to the respondent, Messrs Abu Talib Shahrom & Zahari. The content of the letter is plain and clear. Paragraph 2 of the February 6 letter describes documents forwarded and para 3 clearly states as follows:

Kindly take note that the aforesaid documents are forwarded to your goodselves for presentation purposes at the relevant Land Office and *UPON your undertaking* to release to us the balance purchase price of the above property within three (3)

weeks from the date of presentation on the transfer and *UPON your clients undertaking* to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11th December, 1997 till date of full settlement.

For ease of reference a copy of the February 6 letter is reproduced hereunder.

SAPRUDIN & CO.

PEGUAMBELA & PEGUAMCARA

Your Reference: ATSZ/COR/5365/97/HH

Our Reference: SMS/CT/rs/8/45/97

Date: 6th February, 1998

M/s Abu Talib Shahrom & Zahari

Suite 29.02, 29th Floor, Menara Promet

Jalan Sultan Ismail

50250 Kuala Lumpur

Attn.: Puan Hairolnisah Hamdan

Dear Sirs,

Re: SALE & PURCHASE OF PROPERTY HELD UNDER HS(D) 72032 PT 13278 MUKIM OF AMPANGAN VENDOR: DANDARAWI SDN. BHD. PURCHASER: CD ANUGERAH SDN. BHD.

We refer to your letter dated 5th February, 1997 with regard to the abovecaptioned matter.

We are pleased to forward herewith the Original Issue Document of Title for the abovecaptioned property and the Original Consent Letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus.

Kindly take note that the aforesaid documents are forwarded to your goodselves for presentation purposes at the relevant Land Office and UPON your undertaking to release to us the balance purchase price of the above property within three (3) weeks from the date of presentation on the transfer and UPON your clients undertaking to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11th December, 1997 till date of full settlement.

Kindy be informed that as at 6th February, 1998 the interest amount to RM8,580.82. Further additional interest is to be added until the date of full settlement.

Your attention to the above matter is highly appreciated.

Meanwhile, kindly acknowledge receipt of this letter and the enclosures herein by signing and returning the duplicate copy hereof.

Thank you.

Yours faithfully,

Sgd.

[12] It will be noted here that the terms of the undertaking imposed by the second appellant are not parlous but plain and clear. These are new terms imposed on the respondent and they supersede the terms of the undertaking letter of 5 February.

[13] As can be seen hereunder the new undertakings imposed are unqualified and unequivocal. To paraphrase it, the documents were forwarded by the second appellant to the respondent:

(a) For the distinct purpose of presentation to the land office;

(b) Upon the undertaking of the respondent to release to the second appellant the balance of purchase price of the said land WITHIN THREE WEEKS from the date of presentation on the transfer; and

(c) Upon the undertaking of the clients of the respondent to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11 December 1997 until the date of full settlement.

[14] It must be highlighted here that there are three obligations to be fulfilled by the respondent as demanded by the second appellant in their February 6 letter. Firstly, the documents were to be forwarded for the purpose of presentation to the land office.

[15] Secondly and more importantly the documents were sent *UPON* the undertaking of the respondent to release the balance purchase price within three weeks from the date of presentation. It is pertinent to note that this term does not include the undertaking of the client but specifically that of the legal firm of the respondent.

[16] Thirdly the documents were released UPON the undertaking of the clients of the respondent to pay the late interest for late payment.

[17] It must be emphasised here that the second requirement imposed is markedly distinct and in divergence with the letter from the respondent in that the undertaking is for the respondent, and not their client, to release the balance purchase price three weeks from the date of presentation of the transfer. This will be further discussed at the later part of this judgment.

[18] The respondent received and accepted the documents forwarded in the form of original issue document of title and the original letter of consent without any qualification and caused the land to be registered in favour of CD Anugerah Sdn Bhd on 24 February 1998. By accepting and sending the necessary documents for registration in favour of their client, it would appear that the respondent has unequivocally accepted the terms imposed onto them by the second appellant in the February 6 letter.

[19] For the sake of completeness the said land was charged in favour of Mobil Oil Malaysia Sdn Bhd as security for the loan of RM1.9m granted to CD Anugerah Sdn Bhd evidenced by a loan agreement dated 16 February 1998.

[20] On 6 March 1998 the respondent notified the second appellant by way of an official letter that the memorandum of transfer in respect of the said land had been presented to the land office vide Presentation No 3089/98 on 24 February 1998.

[21] The balance of the purchase price in respect of the said land was due and payable three weeks after the date of presentation ie on *17 March 1998*. No payment was received by then. Consequently on 18 March 1998 the second appellant wrote to the respondent asking for the release of the sum of RM540,000.

[22] The respondent resiles from their undertaking by replying to the second appellant on the same day in their letter in the following manner:

> We refer to your fax dated 18 March 1998 with regard to the above matter. We wish to confirm that until today, we have yet to receive the balance purchase price of RM540,000 from our client. With regard to the undertaking as contained in our letter dated 5th February 1998, we wish to highlight that such undertaking was given *on behalf of our Client* and not from our firm ...

[23] When the dispute could not be resolved amicably the parties brought the matter before the learned High Court judge at Seremban. After a full trial, it was the decision of the learned High Court judge that the undertaking given by the respondent was not their personal undertaking. Rather, it was an undertaking given by them as an agent of their client. The claim of the second appellant was therefore dismissed with costs, hence this appeal.

FINDINGS OF THE LEARNED HIGH COURT JUDGE

[24] As mentioned earlier, the focus of the trial was on the above mentioned undertaking letter of 5 February.

[25] The learned trial judge found that the facts showed the undertaking letter of 5 February prevailed over cll 5.3 and 6.2 of the agreement.

[26] Like cl 5.3 of the agreement, cl 6.2 also relates to the delivery of the documents upon receipt of full payment of the balance purchase price and it is quoted in *toto* hereunder:

> 6.2 The Vendor's Solicitors shall deliver or cause to be delivered to the Purchaser's Solicitors the Documents upon receipt of full payment of the Balance Purchase price.

[27] The respondent gave the undertaking letter of 5 February on behalf of CD Anugerah Sdn Bhd and not on his personal capacity.

[28] The undertaking letter of 5 February was premised upon the payment of the balance purchase price by CD Anugerah Sdn Bhd.

[29] The respondent can only be responsible with regard to the undertaking if the balance purchase price was received but not given to the first appellant.

[30] It was also the finding of the learned High Court judge that the second appellant knew or ought to have known that when the undertaking letter of 5 February was given, the balance purchase price of RM540,000 has not been received by the respondent.

SHORTCOMINGS IN THE JUDGMENT OF THE LEARNED HIGH COURT JUDGE

When were the appellants notified that the balance of purchase price was not with the respondent?

[31] Contrary to the finding of the learned High Court judge that the second appellant knew or ought to have known that when the undertaking letter of 5 February was given, the balance purchase price of RM540,000 has not been received by the respondent, the facts of the case is totally different. The appellants were only notified by respondent in their letter dated 18 March 1998 under reference ATSZ/COR/5365/97/HH SMS/CT/rs/8/45/97 in respect of the balance purchase price, at p 266 of the appeal record. This is more than a month after the respondent had made an undertaking on behalf of their client as contained in the undertaking letter of 5 February. Paragraph 2 of the letter reads:

> We wish to confirm that until to date, we have yet to receive the balance purchase price of RM540,000.00 from our client.

[32] This was in answer to a query made by the second appellant as contained at para 3 of their letter of 18 March 1998 wherein it was stated as follows:

> We write to inform that pending further instructions from our client M/s Dandarawi Sdn Bhd we hereby request for a written confirmation from your goodselves as to whether the said sum of RM540,000.00 has been deposited with your goodselves.

[33] With respect, the decision of the learned High Court judge was based on a wrong premise. Clearly there was a misdirection here.

[34] Furthermore, by virtue of cll 5.3 and 6.2 of the agreement it is only reasonable for the second appellant to expect that when the undertaking letter of 5 February was issued, there was in all probability the balance purchase price was with the respondent.

The letter dated 6 February 1998 from the second appellant was completely ignored by the learned High Court judge in his evaluation of this case

[35] It has to be observed here that although the learned High Court judge analysed the implications and consequences of the undertaking letter of 5 February, there is sadly an absolute lack of deliberation and appreciation on the efficacy of the 6 February letter. This letter is equally important in that it qualifies the undertaking letter of 5 February. This is a crucial letter in that the second appellant sent the documents to the respondent UPON the UNDERTAKING of the respondent to release to the appellant the balance purchase price of the said land WITHIN three weeks from the date of presentation of the transfer. The fact that this was completely ignored clearly shows that the premise upon which the learned High Court judge came to his conclusion and finding cannot be sustained.

The testimony of the writer (SD1) of the undertaking letter of 5 February

[36] No where in the judgment of the learned High Court judge could one find any shred of analysis of the testimony and understanding of the writer of the undertaking letter of 5 February in respect of the February 6 letter sent by the second appellant. The writer of the undertaking letter of 5 February was *SD1, Puan Hairolnisah Hamdan*. SD1 was also the solicitor who received the original issue document of title and letter of consent which were enclosed in the 6 February letter. Such testimony, in our view, is not only useful but pivotal for a proper interpretation and evaluation of both the undertaking letter of 5 February and the 6 February letter.

TESTIMONY OF PUAN HAIROLNISHA HAMDAN

[37] It is appropriate here to advert to the evidence adduced by SD1, Puan Hairolnisha Hamdan on behalf of the respondent. SD1 signed the undertaking letter of 5 February and received both the original issue document of title and the letter of consent which were enclosed in the 6 February letter addressed to the respondent.

> Q: (Referring to the Undertaking Letter of 5th February)
>
> Do you agree with me that we in 'we undertake' refers to the 2nd Defendant
>
> A: Yes.
>
> Q: (Referring to letter dated 6th February Letter @ pages 250–251 of Appeal Record)
>
> Do you agree with me that the 2nd Plaintiff states that he sends the Original Title and Original Letter of Consent upon *your undertaking* ... and *your client's undertaking* ...?
>
> A: Yes.
>
> Q: Do you agree with me that there are 2 undertakings, one by the 2nd Defendant, the other the 1st Defendant's undertaking?
>
> A: Yes.
>
> Q: Did you after reading this letter (pages 250–251 of Appeal Record) disagree with the terms therein and return the Original title and Original Letter of Consent to 2nd Plaintiff, saying that the 2nd Defendant does not agree to Undertake?
>
> A: No.
>
> (Emphasis added.)

[38] From the above excerpt it is patently clear therefore that SD1 agreed with the proposition posed during cross-examination that she did not disagree with the terms of the 6 February letter. Further SD1 also confirmed that neither did she return the original title and original letter of consent to the second plaintiff nor did she say that the second defendant does not agree not to undertake as required by the appellant.

[39] Put simply, SD1 agreed with the terms imposed by the 6 February letter and in the event that those terms were not agreed to, the original issue document of title together with the original letter of consent would have been returned to the second appellant.

[40] It will be observed that para 3 of the 6 February letter contains two undertakings as admitted by SD1 and these are:

(a) the undertaking of the respondent to release to the second appellant the

balance purchase price of the said land within three weeks from the date of presentation of the transfer; and

(b) the undertaking of the client of the respondent to pay the interest for late payment.

[41] These terms are couched in lucid, clear, unqualified and unequivocal language. The respondent received and accepted the original documents of title and the original consent letter without any qualification and caused the said land to be transferred and registered in favour of CD Anugerah Sdn Bhd on 24 February 1998. In so doing the respondent had agreed to accept and comply with the terms of the 6 February letter.

[42] From the above appraisal, the following can be deduced:

(a) The 6 February letter supersedes the undertaking letter of 5 February;

(b) SD1 accepted the terms and conditions imposed by the appellant as contained in the 6 February letter;

(c) If the terms of the 6 February letter was unacceptable to the respondent then the original issue document of title in respect of the said land together with the original consent letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus would have been returned to the second appellant;

(d) The second appellant only knew that the balance purchase price of the said land was not with the second respondent on 18 March 1998.

THE LAW

The construction of the undertaking letter of 5 February and the 6 February letter

[43] The respondent received and accepted the 6 February letter without any qualification and acted on it by causing the said land to be registered in favour of CD Anugerah Sdn Bhd and subsequently charged the same to Mobil Oil Malaysian Sdn Bhd.

[44] The subsequent letters written by the respondent after the registration of the transfer and charge are an afterthought. On the issue of construction and conduct of parties subsequent to the execution of contract, see *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 where the House of Lords said:

> In construing a contract (eg for purposes of ascertaining any intention of the parties thereto as to the proper law) it was not proper to have regard to the conduct of the parties after the contract had been made.

[45] Lord Reid in his judgment said at p 798:

> I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

[46] With respect we agree with the sentiments expressed above and accept it the correct principle of law. Hence the letters made after the 6 February letter cannot be taken into account to ascertain the intention of the parties. Furthermore s 73A(3) of the Malaysian Evidence Act 1950 (Act 56) says, 'Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish'.

LETTER OF UNDERTAKING FROM SOLICITORS

[47] The importance of respecting an undertaking given by solicitors is being underlined by Suriyadi JCA in *Nasir Kenzin & Tan v Elegant Group Sdn Bhd* [2009] 1 AMR 715 when His Lordship said at p 729: '... the impugned undertaking is a promise or security given in the course of an arrangement for obtaining some concessions from the respondent, and binds the appellant in law. The seriousness of an undertaking cannot be underestimated especially one given by a member of the legal profession because a breach of the undertaking will whittle away public confidence and trust in the legal profession.'

[48] The probity, decency and credibility of the solicitors who failed to honour their letter of undertaking will be at stake. Letters of undertaking are widely used in the legal practice particularly in firms which handled substantial conveyancing work. In practice letters of undertaking are used in a number of transactions ranging from the release of funds to customers by banking and financial institutions before documents of unencumbered document of titles are properly registered with the appropriate land registries. Another situation where a letter of undertaking is being used is where documents of titles are released before full payment of the purchase price had not been made as in this instant case. Solicitors making the undertaking should not renege on their undertaking as this is the very basis for their own honoured existence as conveyancing lawyers. This is a solemn and sacred duty of solicitors. Issuance of a letter of undertaking from one firm to another marks the epitome of conveyancing practice in any Torrens jurisdiction.

[49] It is incumbent upon all solicitors to examine each given undertaking closely. The fact that the undertaking is made on behalf of their client should not and will not absolve themselves from the need to be responsible for their action in ensuring that all are in order before such letters of undertaking are issued or accepted or even acted upon. This is because each and every word used must be properly construed as in the English Court of Appeal's case of *Caldwell v Sumpters (a firm) & Anor* [1972] 1 All ER 567. The brief facts of the case was that Sumpters, the first defendants, were formerly the plaintiff's solicitors and were instructed by her to act, amongst other things, in connection with the proposed sale to the Brighton Corp of her house at Brighton. For this purpose the plaintiff's title deeds to the house were deposited with Sumpters. There was no binding agreement to buy the house but the Brighton Corp had indicated their willingness to buy it providing the plaintiff could give vacant possession. The difficulty was that the tenants occupying the house refused to move out prompting Sumpters, with the plaintiff's authority, instructed Bosley & Co, a firm of solicitors practising in Brighton, to take the necessary proceedings to evict the tenants.

[50] Sumpters, on the plaintiff's instructions, gave Bosley & Co their undertaking that the costs incurred in connection with these proceedings would be paid. Sumpters, also by a letter written on the plaintiff's instruction, gave their undertaking to her bank that on the completion of the sale of the house they would discharge the plaintiff's indebtedness to her bank out of the proceeds of the sale.

[51] Then in summer of 1969, the plaintiff changed her solicitors, transferring her legal business to Margolis & Co. At that time, according to Sumpters, the plaintiff owed them some 322 sterling pounds for costs. In October 1969 Margolis & Co had for some time been pressing Sumpters for the title deeds of the house. These were required to prepare a contract of sale to the Brighton Corp and would be required subsequently to hand over to the corporation on completion. Sumpters, however claimed the solicitor's lien over these documents in respect of their costs and their personal liability on the undertakings referred to earlier. Neither the lien nor its amount was disputed. Sumpters expressed their willingness to hand over the title deeds to Margolis & Co providing that Margolis & Co would undertake to honour the undertakings which Sumpters had given on the plaintiff's instructions to Bosley & Co and the bank and also undertake to pay the costs due by the plaintiff to Sumpters. Margolis & Co asked Sumpters for details of these undertakings. This was not forthcoming and the undertakings were never given.

[52] On 15 January 1970, Sumpters sent the deeds to Margolis & Co under cover of a letter, the material part of which reads as follows:

> These deeds and documents are being sent to you on the understanding that you will hold them to our order, pending the payment of our fees and your Undertaking to honour those Undertakings which we have given on behalf of Mrs Caldwell (the plaintiff), on her instructions, and the payment of fees, etc, of other professional firms who have acted on Mrs Caldwell's instructions and have not yet been paid by her.

[53] Salmon LJ said at p 570g–i:

> The crucial factor in this case is that Sumpters, because of their lien, had the legal right to possession of the documents. The documents were being offered on the terms of the letter of 15 January. *The law does not in my view allow retention of the documents and repudiation of the terms on which they are offered. This seems to me to be clear on principle*. There is little authority on the point, possibly because it is so plain. What authority there is tends to support the view I have formed. There is certainly no authority the other way. (Emphasis added.)

[54] Similarly in this instant case, the original document of title and the original consent letter were offered to the respondent on the terms of the 6 February letter. In the event that the respondent was unable to perform the obligations required they should have returned the document of title and the original consent letter to the second appellant. The respondent failed to return the documents and proceeded with the registration of the transfer and in the upshot they must be held to have accepted the terms of the February 6 letter and must be held responsible for the undertaking.

[55] In a High Court of Australia's case of *Hawkins v Gaden* (1925) 37 CLR 183 Starke J summed up at p 207 as follows:

> The legal effect of the undertaking remains for consideration. When a party undertakes, without any qualification, to satisfy requisitions or to obtain an authority to receive money, that must mean that he is the person to whom the other party is to look for performance of the promise. The defendants are, therefore personally liable upon the undertaking.

[56] He adds further that 'The defendants or their clerk may not have appreciated the effect of the undertaking, and that is, no doubt, unfortunate. The construction, however, of the undertaking does not depend upon the understanding of the defendants, but upon the legal effect of the words which they have used in that document'.

[57] This prompted Lord Diplock to say in the Privy Council case of *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 at p 269 that: 'The main purpose and value of a solicitor's undertaking in transactions for the sale of

land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale.'

[58] For the purpose of completeness, it is desirable to look at the authority cited by the learned High Court judge at p 25 of the appeal record ie *Syarikat Jengka Sdn Bhd v Tri Trade Properties (M) Sdn Bhd & Anor* [1988] 3 MLJ 163; [1988] 2 CLJ (Rep) 451. The facts are simple. The plaintiff's claim against the defendant is for the sum of RM346,500 being balance owned to the plaintiff in respect of goods sold and delivered to the first defendant. The second defendant is alleged to have by a letter of undertaking undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a maximum of RM500,000 and upon the expiry of sixty days after the date of delivery of the said goods. The second defendant denied that he was liable to pay the plaintiff the amounts claimed.

[59] Held No 2: Clearly there are issues to be tried in this case.

[60] This case relates to an application for summary judgment and is therefore distinguishable on facts.

[61] The learned judge ordered that the application of the plaintiff dated 24 April 1985 for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment be entered against the second defendant be disallowed on the grounds that there are triable issues of fact.

[62] This case cannot be used as the authority for an undertaking letter as can be seen in the judgment of the learned Zakaria Yatim J (as he then was) where he said at p 451h:

> This is an appeal against the decision of the senior assistant registrar, Mr Wong Teik Meng given on 15 August 1985 ordering that the application of the plaintiff dated 24 April 1985 *for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment be entered against the second defendant be disallowed on the grounds that there are triable issued (sic) of fact in this matter*. (Emphasis added.)

[63] At p 454c the learned judge concluded:

> Clearly there are issues to be tried in this case and I agree with the decision of the senior assistant registrar. I therefore dismiss the appeal with costs in any event.

[64] From what has been discussed earlier, it was the unanimous decision of this court that if the respondent was unable to adhere and comply with the

requirements of the 6 February letter, the respondent should have returned the documents to the second appellant rather than proceed to register the transfer. On the balance of probabilities the respondent's failure to return the original document of title and the original consent letter to the second appellant means that the respondent accepted the terms imposed by the second appellant as contained in the 6 February letter and therefore liable and is hereby held liable.

[65] The appeal is hereby allowed with costs. After hearing the submission of both counsel costs was fixed at RM20,000 to be paid by the respondent to the appellants. The decision of the learned High Court judge is hereby set aside.

Appeal allowed with costs.

Reported by Kohila Nesan